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No. 73-943

# In the Supreme Court of the United States

OCTOBER TERM, 1973

THE CITIZENS ENVIRONMENTAL COUNCIL, ET AL.,
PETITIONERS

*v.*

CLAUDE S. BRINEGAR, SECRETARY OF TRANSPORTATION,
ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, A1-A5) is reported at 484 F. 2d 870. The opinion of the district court (Pet. App. C, A9-A26) is reported at 364 F. Supp. 286.

### JURISDICTION

The judgment of the court of appeals was entered on September 19, 1973. The petition for a writ of certiorari was filed on December 18, 1973. The juris-



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diction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the district court properly entered summary judgment where substantial review of the agency record and petitioners' conclusory allegations disclosed that the environmental impact statement for a 2.76-mile highway by-pass was satisfactory as to form, substance and drafting.

## STATUTE INVOLVED

Title I of the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. 4331, *et seq.*, is appended to the petition (Pet. App. D, A27–A30).

## STATEMENT

Petitioners brought this action to enjoin the proposed construction of a highway project, the relocation of 2.76 miles of U.S. Route 69 near Kansas City, Kansas. The planned highway section, locally called the Switzer By-Pass, was conceived in 1959, and the right of way was largely acquired in the early 1960's in what was then a rural area. Since its acquisition the right of way has been reserved as a highway corridor in order to serve the area, which has become increasingly urban[1] as predicted in a 1959 traffic study which recommended this highway to serve the expanding population.

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[1] Petitioners are part of that urban trend. Collectively they are groups and individuals who purchased newly erected homes in the highway corridor area with knowledge of eventual highway construction (Pet. App. C, A14).

All statutory prerequisites to construction were accomplished, including the preparation, circulation and filing of an environmental impact statement (EIS) required by the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. 4321, *et seq.* Three months after the final EIS was filed, petitioners brought this action alleging various improprieties on the part of the agencies involved. Petitioners seek to have the highway corridor converted to a park or recreation area.[2]

The district court granted respondents' motion for summary judgment (Pet. App. C, A26), and construction of the highway then commenced.[3]

The court of appeals denied petitioners' application for an injunction pending appeal (Pet. App. B, A6). After briefing and oral argument on the merits, the court of appeals rules that the EIS was sufficient and had been prepared consistently with NEPA (Pet. App. A, A1–A5) and that disposition by summary judgment was appropriate in this case.

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[2] As the district court observed (Pet. App. C, A24):

"Plaintiffs predominate [*sic*] purpose in maintaining this action, judging by the emphasis placed on this issue by them in the record, is to somehow require the use of a strip of land, acquired several years ago for highway purposes, for a public park and recreational area. They base their claim in this regard on the provisions of 49 U.S.C. § 1653(f) and 23 U.S.C. § 138, and regulations promulgated thereunder."

[3] The contract for initial grading and for structures is 47% complete—most physical disruption of the area has already occurred. Surfacing contracts are scheduled for letting in May 1974.

## ARGUMENT

1. The Federal Highway Administration did not improperly delegate the preparation of the environmental impact statement. The EIS was properly prepared within valid agency guidelines. The Federal Highway Administration (FHWA) procedure makes a functional delegation to the State highway department requiring it to assemble background data, prepare a draft EIS, circulate it for comment, collate comments and respond to environmental problems encountered, and submit a final State EIS to FHWA. This final State EIS is then tendered to the Regional Federal Highway Administrator who accepts it only if it is satisfactory. It is then reviewed by the environmental staff of the Secretary of Transportation. If acceptable to the staff, it is approved by the Secretary and filed with the Council on Environmental Quality (CEQ) as the federal project EIS. FHWA Policy and Procedure Memorandum 90-1, August 24, 1971.[1]

Critical to the procedure is the Secretary's prerogative to make comments, to require expansion, alterations, additional research, or re-evaluation, and to reject the statement prepared by the State. The Secretary exercises this prerogative when warranted. See, *e.g.*, *Movement Against Destruction* v. *Volpe*, 361 F.

[1] The petition (Pet. App. G, A48-A61) contains only excerpts from PPM 90-1. The full text of the August 24, 1971, version appears at 2 ELR 46106 and substantially the same version was published on October 14, 1972, 37 Fed. Reg. 21809, and currently appears at 23 C.F.R. App. A, p. 61.

Supp. 1360, 1385–1386 (D. Md.), affirmed (C.A. 4, No. 73–2135, March 19, 1974).[5]

Like the court below, the other courts of appeals which have reviewed the EIS procedure employed by FHWA have found it to be a satisfactory implementation of NEPA. *Iowa Citizens for Environmental Quality* v. *Volpe*, 487 F. 2d 849 (C.A. 8); *Finish Allatoona's Interstate Right, Inc.* v. *Volpe*, 355 F. Supp. 933 (N.D. Ga.), affirmed *per curiam*, 484 F. 2d 638 (C.A. 5).[6] Essentially the same procedure, employed by the Federal Aviation Administration, was approved

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[5] Here the EIS was prepared by the State in cooperation with FHWA (Pet. App. C, A21) and the final decisions regarding the EIS were federal (Exhs. L & S). The affidavit of Robert W. Morrissey, Division Engineer, FHWA, along with the established agency procedure (PPM 90-1), shows sufficient federal nexus in EIS preparation to distinguish this case from a mere rubber stamp situation.

[6] See also *National Forest Preservation Group* v. *Volpe*, 352 F. Supp. 123 (D. Mont.); *Movement Against Destruction* v. *Volpe*, *supra*, 361 F. Supp. at 1393. Two cases relied upon by petitioners require clarification. *Northside Tenants' Rights Coalition* v. *Volpe*, 346 F. Supp. 244 (E.D. Wis.), was modified by an order, pursuant to a stipulation, entered January 17, 1973, to allow state and local preparation of the EIS in accordance with PPM 90-1. The modification order is not officially reported (3 ELR 20154). *Committee to Stop Route 7* v. *Volpe*, 346 F. Supp. 731, was reconsidered (D. Conn. No. 15951, Sept. 6, 1972), not officially reported (4 ERC 1681). The second opinion (4 ERC at 1684) limits the sweeping language quoted by petitioners (Pet. 14), and holds that whether there has been sufficient federal involvement in the preparation of the EIS is ultimately a fact question to be determined in the entire record.

by the Ninth Circuit. *Life of the Land* v. *Brinegar*, 485 F. 2d 460, petition for a writ of certiorari pending, No. 73–1088.

Moreover, the new NEPA implementing guidelines promulgated by CEQ are consonant with the FHWA procedure. Section 1500.7(c), CEQ Guidelines, Preparation of Environmental Impact Statements, 38 Fed. Reg. 20553. These interpretations of a statute by the agency charged with its administration are entitled to deference. See *Ehlert* v. *United States*, 402 U.S. 99, 105; *Udall* v. *Tallman*, 380 U.S. 1, 16. *Greene County Planning Board* v. *Federal Power Commission*, 455 F. 2d 412 (C.A. 2), certiorari denied, 409 U.S. 849, relied upon by petitioners, is inapposite. It proscribed a rubber-stamp exercise and did not involve the cooperative inter-relationship between state and federal agencies involved here and required by the Federal Aid Highway Act of 1968, 23 U.S.C. 101, *et seq.*[7]

2. Summary judgment was appropriate in this case. After substantial review of the agency record,[8] the district court concluded that the EIS was adequate notwithstanding petitioners' general and unsubstantiated allegations. Peteitioners simply failed to satisfy

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[7] The FHWA procedure is an attempt to insure that NEPA is "carefully meshed with more traditional patterns of federal regulation [*viz.* the Federal Highway Act]". *Aberdeen & Rockfish R. Co.* v. *S.C.R.A.P.*, 409 U.S. 1207, 1218. The initial State EIS preparation is consistent with NEPA, whose goals are to be achieved "in cooperation with State and local governments * * *." NEPA, Section 101(a), 42 U.S.C. 4331(a).

[8] Cf. *Camp* v. *Pitts*, 411 U.S. 138; *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402.

their obligation of showing the existence of issues of material fact necessitating proceedings beyond the hearings accorded.[9] Rule 56(e), Fed. R. Civ. P.: *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 288–290.

The EIS, which was reviewed and found adequate by both the district court and the court of appeals, is commensurate with the scope and purpose of this 2.76-mile highway project. It discusses the limited alternatives available, including the possibility of project abandonment. Other location alternatives were rejected because they were incompatible with regional planning and past commitments of resources—the prior acquisition of the corridor. The abandonment alternative was considered and rejected because it failed to remedy the existing problem of congestion (Pet. App. E, A37). Rail rapid transit was regarded as not a viable alternative to the special purpose highway under consideration here. Cf. *Movement Against Destruction* v. *Volpe*, *supra*, 361 F. Supp. at 1389; *Citizens for Mass Transit Against Freeways* v. *Brinegar*, 357 F. Supp. 1269, 1283 (D. Ariz.).

While the EIS is terse, it states the operative considerations and reflects the fact that environment fac-

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[9] The affidavits upon which petitioners rested were the generalized, conclusory and unsubstantiated opinions of four local residents possessing no particular environmental qualifications or technical expertise. As such they were, as the court of appeals stated (Pet. App. A. A5), insufficient to raise a factual dispute. *Ashcroft & Co.* v. *Transamerica Ins. Co.*, 407 F. 2d 762, 766 (C.A. 7). One of the four identical affidavits is appended to this brief (Appendix, *infra*).

tors received consideration in the decision-making process. Nothing in the opposing affidavits raised any material question of fact concerning its operative considerations (see Appendix, *infra*).

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
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WALLACE H. JOHNSON,
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RAYMOND N. ZAGONE,
GEORGE R. HYDE,
TERRENCE L. O'BRIEN,
*Attorneys.*

APRIL 1974.

# APPENDIX

For the District of Kansas

Civil Action No. T-5057

THE CITIZENS ENVIRONMENTAL COUNCIL, ET AL.,
PLAINTIFFS

*vs.*

JOHN VOLPE, SECRETARY OF TRANSPORTATION, ET AL.,
DEFENDANTS

CITY OF OVERLAND PARK, INTERVENOR

*Affidavit*

STATE OF KANSAS,
*County of Johnson*, ss.

I, Bruce W. Witherspoon, of Overland Park, Kansas, being first duly sworn upon my oath, states:

1. That I am a citizen and resident of the State of Kansas residing near the proposed route of the northern leg of the Switzer By-Pass, Project No. 69-46-U083-3 (22).

2. That the proposed project if constructed would not be in the best overall public interest, taking into consideration the need for fast, safe and efficient transportation, public services, and the cost of eliminating or minimizing its adverse effects.

3. The construction of the highway at this time would cause the destruction and disruption of the aesthetic value of my neighborhood and the disruption of the community cohesion that we have developed in our neighborhood.



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4. The construction of this project at this time will cause severe depreciation in the value of the property in our neighborhood and thus cause severe tax losses for the governmental units in our neighborhood.

5. Unless the defendants are restrained and enjoined from letting contracts or taking further steps to construct this highway I will suffer immediate, irreparable injury, loss and damage.

BRUCE W. WITHERSPOON.

Subscribed and sworn to before me this ------ day of ----------, 1972.

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*Notary Public.*

My commission expires:

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U.S. GOVERNMENT PRINTING OFFICE: 1974